INDEX

	Pages
I. STATEMENT OF THE CASE	1
A. The Proceedings Below	1
B. Question Presented for Review	3
C. Factual Situation	3
ARGUMENT	
I. The Question Presented for Review	8
II. Reasons for Granting the Writ	10
III. The Motion was Timely Filed	12
CONCLUSION	15
CERTIFICATE OF SERVICE	16
EXHIBIT A - Order	1a
EXHIBIT B - Transcript	2a
EXHIBIT C - Judgment	4a
EXHIBIT D -Affidavit	5a
EXHIBIT E - Letter to the Honorable Robert R. Merhige, Jr. from Israel Steingold dated September 6, 1974	8a
EXHIBIT F - Letter to the Honorable Robert R. Merhige, jr. from Israel Steingold dated September 20, 1974	10a
EXHIBIT G - Appellant's Reply Memorandum to Motion to Dismiss with atached letter to the Honorable Robert E. Merhige, Jr. from Israel Steingold dated November 22,	

1974 and attached letter to the Honorable Robert E. Merhige, Jr. from Israel Steingold dated December 3, 1974 ..... 11a

EXHIBIT H - Letter to James F. Pascal, Esquire from Israel Steingold dated October 23, 1974 22a

EXHIBIT I - Letter to Israel Steingold, Esquire from James F. Pascal dated October 14, 1974 25a

CITATIONS

CASES:

Boggs v. Dravo, (CA3), 532 F2d 897, ... 9
Fishbaugh v. Armour & Co., 4 Cir., 185 F2d 541. 15
Lashley v. Ford Motor Company, (CA5), 518 F2d 749. 10
Marshall's U.S. Auto Supply v. Cashman, 11 F.2d (10th Cir.), cert. den., 311 U.S. 667 (1940). 12
Mondakota Gas v. Montana Dakota Utilities Co., (CA9), 194 F2d 705..... 12
Motteler v. J.A. Jones, etc. Co., 447 F2d 954 (7th Cir. 1971). 11,13
Parissi v. Telechron, Inc. 349 US 46..... 12
Reed v. People of Michigan 398 F2d 800 (6th Cir. 1968) 10
Rothman v. United States 508 F2d 648 (3rd Cir. 1975). 10
Sterling v. Chemical Bank, CA2, 511 F2d 1030 9
Thomas Day Co. v. Doble Laboratories, 9 Cir., 41 F2d 51 9
Thompson v. Immigration and Naturalization Service 375 U.S. 384, (1964) 11, 13, 15
Torockio v. Chamberlaine Mfg. Corp. 456 F2d 1084 (3rd Cir. 1972) (in banc). 10
Witt v. Merrill, 208 F.2d 285 (4th Cir. 1953).... 11, 15
Wolfsohn, Executrix v. Hankin 376 US 203, (1964) 11,13,15
Yanow v. Weyerhouser Steamship company 274 F.2d 274 (9th Cir. 1959) 9, 15

TREATISES:

9 Moore's Federal Practice § 204.12 [3] (2d ed. 1975). 11, 12

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 76-1623

FIDELITY CORPORATION,
Petitioner,

v.

REGAL WARE, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. STATEMENT OF THE CASE

A. THE PROCEEDINGS BELOW

This was a diversity action instituted in the United States District Court for the Eastern District of Virginia, at Richmond by respondent, Regal Ware, Inc., a Wisconsin corporation, against Fidelity Corporation and its wholly owned subsidiary, American Foresight, Inc., both Virginia corporations, for an indebtedness of $210,571.96.

The case was tried to the court without a jury. The court entered judgment on August 20, 1974, in favor of Regal Ware, Inc. against American Foresight, Inc. for $210,571.96, with interest from July 3, 1973, and against

Regal Ware in favor of Fidelity Corporation .

Regal Ware, Inc. served and filed Motion for New Trial and to Alter and Amend Judgment in favor of Fidelity Corporation on August 27, 1974. The District Judge entered order denying the motion on November 8, 1974. (Exhibit A).

Notice of Appeal was filed on December 4, 1974. (Exhibit C with Petition, p. 14).

The defendant, American Foresight, did not appeal. That judgment is therefore final.

On July 1, 1975, petitioner filed Motion to Dismiss in the Court of Appeals on the ground that the notice of appeal was not filed within thirty days from the date of the judgment appealed from, and stated no grounds whatsoever. Respondent answered within the time required by Rule 27(a), Rules of Appellate Procedure. On August 6, 1975, twenty-three days later, petitioner filed its initial brief or memorandum in support of its motion. Under date of August 8, 1975 the Fourth Circuit entered order denying motion to dismiss, but granting leave to petitioner to renew its motion at the time of oral argument and to brief the question if they be so advised, which they did.

Fidelity had sought an injunction in the Fourth Circuit and in the District Court to restrain respondent and other creditors of American Foresight from proceeding in a general creditors' suit pending in the state court at Richmond. In its opinion of January 11, 1977 the Fourth Circuit denied the motion for injunction, and concluded its opinion, "We have considered the other contentions of Fidelity and are of the opinion they are without merit". (This relates to Fidelity's motion to dismiss the appeal). (Opinion, pages 47-48).

By opinion dated January 11, 1977, the Court of

Appeals for the Fourth Circuit reversed the judgment in favor of Fidelity Corporation and remanded with instructions to the District Court to enter judgment against Fidelity Corporation in the same amount as the judgment against American Foresight, Inc., "but with the condition that the judgment may not be satisfied other than from the ascertained value of the assets of Foresight wrongfully diverted by Fidelity, that is to say, the accounts assigned ($2,200,000.00), and cash asset of $241,331.00 and the property given to charity."

There was the further provision that the proceeds be paid into the District Court "which will make the monies available to the Virginia court in which the creditors' suit is pending".

Fidelity filed petition for a rehearing in the Court of Appeals, which was denied on February 23, 1977. (Exhibit D, p. 15, Petition for Writ of Certiorari).

Thereafter petitioner moved that the mandate be stayed, which motion was denied on April 7, 1977.

Petitioner petitioned this Court to stay the mandate, which was denied by the Chief Justice on April 21, 1977.

B. QUESTION PRESENTED FOR REVIEW

The question fo. review as posed by petitioner omits the essential detail that respondent filed its Notice of Appeal within thirty days after the district judge had entered order denying its Motion for New Trial and to Alter and Amend, thereby complying with Rule 4(a), Federal Rules of Civil Procedure. (Rule quoted in Petition at p. 4).

C. FACTUAL SITUATION

For the reason that the facts stated in the Petition for Writ of Certiorari omit and understate salient details

essential to a proper understanding of the true situation existing which led the Fourth Circuit to deny motion to dismiss the appeal on three separate occasions, respondent will outline briefly what it considers to be the pertinent facts.

After the Court, without a jury, had heard evidence on Thursday, Friday and Monday morning, August 15th, 16th and 19th, 1974, the case was argued on Monday the 19th, before the luncheon recess. (Exhibit B, Tr. 510). The Court reporter was excused prior to argument. At the conclusion of argument the district judge announced that he would prepare his findings of fact and conclusions of law and dictate them to the court reporter later that afternoon. He then stated that it would not be necessary for counsel to be present, that a copy of his findings would be forwarded to all counsel by the court reporter.

Thereupon counsel for respondent Regal Ware, Inc. returned to his office at Norfolk.

On the morning of August 20, 1974, counsel for respondent had requested that respondent Regal Ware be permitted to amend its action into a general creditors' suit. This is shown in a two-page supplement to the trial transcript, entitled "Partial Proceedings". "Partial Proceedings", a two-page transcript of the proceedings of the morning of August 20th, was first seen by counsel for respondent when filed by counsel for petitioner as an exhibit with its memorandum in support of its Motion to Dismiss in the Court of Appeals, on August 6, 1975. The following is taken from this supplement:

> "THE COURT: About ten minutes ago Mr. Steingold called, I think from Norfolk, and I spoke to him because my secretary couldn't seem to fully understand what his problem was. But what it was, in effect he wished to file an amendment to his complaint, the style, I gather, to be Regal Ware, Incorporated on behalf of itself and all creditors. In any event, I told him that I would not delay my findings, that he should take it up with Mr. Allen, and if you had no objections, I was perfectly willing to permit the amendment.
>
> "Now, first I will ask you, has he been able to get you. I doubt if he has.
>
> "MR. ALLEN: He may have tried. I was not in the office.
>
> "THE COURT: So you have not talked to him?
>
> "MR. ALLEN: No, sir.
>
> "THE COURT: I did tell him that unless you acquiesced, he could make such motion as he wished, either of you could, after I have given my findings of fact, and if the entry of the judgment which I am about to enter in any way interferes with the motion, should it be well taken, I will set the judgment aside for that purpose. But I told him I felt you ought to be heard, and vice versa; if you have any, I want him to be heard."

On August 21, 1974, counsel for respondent received copy of judgment entered by the Clerk on August 20, 1974. (Exhibit C).

By reason of being present before the District Judge in connection with a pre-trial hearing in Civil Action 170-73-R, on August 22, 1974, Jeffrey M. Steingold, counsel's son and Richmond partner, attempted to obtain a copy of the findings from the court reporter. The reporter's office, which was then opposite Judge Merhige's office, was locked. Upon inquiring at the district court Clerk's office, on the same floor, he was advised that the reporter

had gone out of town, on vacation. (Exhibit D — Affidavit filed in Court of Appeals).

Becoming apprehensive because of the delay, counsel telephoned the district judge at Richmond from his office at Norfolk on August 27, 1974, explaining the complication developing in not being able to obtain a transcript of his findings in order that he might comply with Rules 59(e) and 7(b)(1) of the Federal Rules of Civil Procedure.

The judge suggested that counsel file motion to alter and amend and reserve the right to assign specific grounds when copy of the court's findings were made available. *This suggestion was complied with that day.* The filing of the motion in this form is the sole basis for petitioner's request for certiorari.

On September 3, 1974, upon learning that the court reporter had returned to his office, respondent's counsel then went to Richmond from his office at Norfolk to attempt to obtain a copy of the findings, the reporter having refused to furnish a copy to counsel's Richmond partner or permit him to see a copy for the reason that the findings "had not been edited" by the district judge. The reporter then refused to permit respondent's senior counsel to see a copy, stating that he had prepared the findings in rough and that they had not been approved by the judge. Judge Merhige was not available, then sitting in Boston.

Counsel thereupon approached the judge's secretary, whose office was across the hall from that of the reporter, with the request that he be permitted to see a copy of the draft of the findings with the understanding that it was a "rough draft", subject to correction. She appeared reluctant, but upon being advised of the urgency, went into the judge's chambers and returned, stating she could not find it.

Counsel had served a copy of his Motion for New Trial on counsel for petitioner at the time it was mailed to the Clerk of the District Court. *No objection was then raised to it or to its form at that time or at any other time until July 1, 1975,* at which time the Motion to Dismiss was filed with the Fourth Circuit. *At that time the court reporter's expense of approximately $1,000 had been incurred, respondent's opening brief was prepared or already filed with the Court of Appeals, and a very exhaustive Appendix had been prepared for filing or had been filed.*

On September 6, 1974, in order to be able to prepare a memorandum in support of his motion as required by local rules of court,[1] counsel wrote Judge Merhige, with copy to opposing counsel, calling his attention to the need for copy of his findings, which still remained unavailable. *He reminded the judge that he had followed his suggestion in reserving the grounds until receipt of the findings. No reply was received.* (Exhibit E).

This was followed by another letter to the district judge on September 20, 1974, pleading for copy of his findings *and again repeated the judge's authorization to supply detailed grounds upon receipt of copy of his findings.* Then, on September 27, 1974, as indicated by rubber stamp at bottom right hand corner of respondent's original copy, counsel received the original of his letter of September 20th to Judge Merhige, with the judge's notation at the bottom stating that the findings had been filed "several weeks ago". (Exhibit F p. 10a herein), Counsel for respondent then called the

---

[1]Rule 11(F) "Briefs Required: All motions, unless otherwise directed by the Court . . . shall be accompanied by a written brief setting forth a concise statement of the facts and supporting reasons . . ."

Clerk's office and found that the findings had been filed September 9, 1974. They were 14 pages in length.

At no time during this one-way correspondence did the district judge disaffirm or question counsel's reference to his authorization to word the motion as filed.

Counsel for respondent Regal Ware accidently learned on December 4, 1974, by means of an allegation in petitioner Fidelity's Cross-Bill seeking $250,000 damages for joining it as a defendent in the general creditors' suit pending in Richmond Circuit Court, that the district judge had denied its Motion to Alter and Amend by order entered November 8, 1974. Otherwise, the notice of appeal would have been filed late and counsel would have found it necessary to seek an order to permit late filing for excusable neglect under Rule 60(b) (1), Federal Rules of Civil Procedure.

Counsel for Fidelity was urging respondent to seek a date for hearing the motion as late as October 14, 1974 without any suggestion that it was improper. (Exhibit I herewith).

ARGUMENT

I.

THE QUESTION PRESENTED FOR REVIEW

The question as posed uses the catch-phrase "where the notice of appeal is filed 107 days after the date of entry of judgment by the District Court . . ."

This is a half-truth, omitting the fact that respondent filed Motion for New Trial and to Alter or Amend Judgment within ten days of entry of judgment as required by Rule 59(e), Federal Rules of Civil Procedure. (Quoted at page 3 of the petition for certiorari).

Petitioner alleges that the contents of the motion are

not in *strict* compliance with Rule 7(b)(1) of the Federal Rules of Civil Procedure.

Petitioner further omits, in the question as presented, that the District Judge ruled on the motion to alter and amend by order entered November 8, 1974, denying the motion, and that the Notice of Appeal was filed within 30 days thereafter as required by Rule 4(a), Federal Rules of Appellate Procedure. (Rule quoted at page 4 of the petition for certiorari).

It is therefore apparent that the true question for review does not concern a notice of appeal filed 107 days after entry of judgment, *but whether an allegedly defective motion timely filed is a nullity.* The rule seems to be to the contrary. *Yanow v. Weyerhouser Steamship Company* (CA 9 1959) 274 F2d 274, 282, 283. In a comprehensive opinion the Ninth Circuit, citing authorities, held "that in order to suspend the running of the 30-day appeal period allowed by Rule 73(a) a motion for new trial need not be granted or even be grantable. *Thomas Day Co. v. Doble Laboratories,* 9 Cir., 41 F2d 51, 52; *The Astorian,* supra." (At page 283).

While petitioner has cited two cases each from the Second, Third, Fifth, Seventh, Eight, Ninth and Tenth Circuits, allegedly in support of the proposition "that timely filing of notice of appeal is a prerequisite to appellate jurisdiction", a careful analysis of each of the cases cited indicates no conflict with the decision of the Fourth Circuit in this case.

Sterling v. Chemical Bank, CA 2, 511 F2d 1030, may be read to support respondent's position here, although it is not in point. Notice of appeal was filed after 30 days of judgment. It was remanded to determine whether there was excusable neglect.

Boggs v. Dravo, (CA3), 532 F2d 897, involved a

motion to alter and amend, as did *Torockio v. Chamberlaine Mfg. Corp.* (CA3, 1972) (in banc), 456 F2d 1084, 1085. The Third Circuit refused to follow restrictive interpretation, holding that appeal was timely filed.

Rothman v. United States (CA3, 1975) 508 F2d 648, was strictly a question of whether notice of appeal was filed in time. Remanded to determine whether Rothman did "all that could be reasonably be expected to get the letter" to the Clerk's office on or before January 7. May be cited in favor of respondent's position here.

Lashley v. Ford Motor Company (CA5) 518 F2d 749. The notice of appeal was filed late. By a *per curiam* opinion the Fifth Circuit remanded "for a determination of whether there was excusable neglect."

The Seventh Circuit cases involve excusable neglect. Cited in support was *Reed v. People of Michigan* (CA6, 1968) 398 F2d 800, where it was held that "excusable neglect was apparent in the record."

The effect of the Ninth Circuit case was changed by amendment to Rule 4(a), FRAP *(U.S. v. Molitor)* which amendment extended time for notice of appeal by any other party for 14 days after the date on which the first notice of appeal was filed. This was to avoid cutting off other parties' right to appeal when the first appeal was filed at the last moment.

The other cases cited do not even remotely decide the question here involved.

II.

REASONS FOR GRANTING THE WRIT

1. *The first reason stated in order to comply with Rule 19(b) of this Court is that the decision by the Fourth Circuit in this case conflicts with decisions of other courts*

of appeal on the same matter.

As stated, the cases cited by petitioner just do not bear this out.

Actually, the text writers, particularly Moore on Federal Procedure, at volume 9 at page 961, in note 3, in discussing the Fourth Circuit case of *Witt v. Merrill*, (CA4, 1953), 208 F2d 285, concludes:

> "On the precise facts, the result seems sound in the light of the subsequent ruling of the Supreme Court in *Thompson v. Immigration and Naturalization Service* (1964) 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed. 2d 404, 7 FR Serv 2d 73a. 62, Case 3"

> "In *Thompson*, supra, the Supreme Court said:

> "For if any question had been raised about the timeliness of the motions at this juncture, petitioner could have, and presumably would have, filed the appeal within 60 days of entry of the judgment, rather than waiting, as he did, until after the trial court had disposed of the post-trial motions."

On its facts *Witt*, supra, is directly in point here in respondent's favor, and *Thompson* is of the highest authority. In effect, petitioner asks this Court to reverse *Thompson* as well as *Wolfsohn, Executrix v. Hankin* (1964) 376 US 203, 84 S.Ct. 699 11 L.Ed. 636, which cited and followed *Thompson*. See *Motteler v. J.A. Jones, etc. Co.* (CA7, 1971), 447 F2d 954, 955.

2. *The second ground stated is that the decision conflicts with the decisions of the Supreme Court of the United States.*

On the contrary, this decision follows *Thompson v. Immigration and Naturalization Service*, supra and *Wolfsohn, Executrix, v. Hankin*, supra. The factual

situation in both parallels that of the case at bar. It would be difficult to distinguish either fact or principle between these cases.

In *Parissi v. Telechron, Inc.*, 349 US 46, 47, 75 S.Ct. 577, 99 Led 678, this Court expressly disapproved the decision of the Ninth Circuit where it had applied a strict interpretation of federal rules in *Mondakota Gas v. Montana Dakota Utilities Co.*, (CA9) 194 F2d 705, 706. Petitioner would have this Court withdraw its disapproval of *Mondakota Gas*, supra.

No case reasonably in point decided by this Court has been cited in conflict with the case at bar.

III.

THE MOTION WAS TIMELY FILED

Petitioner here seeks reversal of a substantial judgment against it on the merits by alleging a procedural error, which position is without substance. This Court has twice ruled against petitioner's contention, and cases directly in point have been decided against petitioner's contentions, as will be shown.

At 9 Moore's Civil Procedure 960, in discussing Rule 7(b) of the Federal Rules of Civil Procedure, which requires that a motion shall "state with particularity the grounds therefor", Moore states in note 1 on that page:

> "It was held in *Marshall's U.S. Auto Supply v. Cashman* (CA10, 1940) cert denied (1940), that the district court lacked power to grant a new trial in response to a motion which stated grounds in general terms only. This result is termed 'undesirable'

> in the Committee Note accompanying the 1966 amendment of Rule 59(d), and the amendment authorizes the district court to grant a new trial for reasons not stated in the otherwise timely motion therefor, and presumably, in response to such a general assignment of grounds as that offered in *Marshall's U.S. Auto Supply.*"

This amendment invalidates a line of cases previously adhering to the strict rule. Petitioner urges this Court to adopt an iron-clad, inflexible rule to meet every conceivable situation which may arise. This is obviously impossible. As the various decisions show, great injustice would follow where litigants and their counsel were not remotely at fault in not being able to state in detail grounds for a motion under circumstances such as here, in the initial motion and within the initial ten-day period.

Even had counsel been present when the district judge recited his combined findings of fact and conclusions of law, extending to 14 typed pages, involving involved facts and principles, it still would have been necessary to have the transcribed findings to state in detail the grounds for the motion.

In *Motteler*, supra, the Court, referring to *Wolfsohn v. Hankin*, supra, said:

> "There the district court had entered an order extending the time within which the appellant could move for rehearing under Rule 59. In reliance on this extension of time, the appellant did not file his motion for rehearing within ten days and did not file his notice of appeal until after his motion for rehearing was denied, several months after the original judgment entry. The Supreme Court summarily reversed the court of appeals on the authority of *Thompson*, supra."

Traditionally the ground for motion for a new trial or to alter and amend has been the general statement that the findings were "contrary to the law and the evidence". The motion as drawn may reasonably be construed to so state, in addition to the motion "to open the judgment, take additional testimony, . . . ," which relates to the judge's invitation to renew the motion to convert to a general creditors' suit as quoted at page 5 herin. The timely filing of the motion serves the purpose of the rule to place all parties on notice that a review by the district judge is being sought. Ordinarily the written motion is followed up with a brief or written memorandum setting forth the specific grounds, just as was done here. Here the Memorandum in Support of Motion to Alter and Amend Judgment was filed October 10, 1974, promptly after receiving copy of the findings. (Exhibit H).

"The rationale of the cases relating to informal or irregular appeals is that notwithstanding the papers filed were inaptly worded, or labeled, or even failed to used the word 'appeal', or were filed in the wrong court, yet they sufficed to show the party intended to appeal. Similarly, the application for time in which to move for a new trial gave notice of appellant's intent to so move, and was an initiation of efforts to that end."

★ ★ ★

"It is true that motion for an extension of time within which to file a motion for new trial *stated no grounds for which a new trial would be sought;* but the fact that this motion, considered as an inartificially drawn motion for new trial was so de-

fective that it could not properly be granted, *would not serve to render it non-existent." Yanow v. Weyerhouser Steamship Company,* supra.

CONCLUSION

It is respectfully submitted that when a written motion for a new trial or to alter and amend a judgment is timely filed, if entertained by the court and not objected to within time to perfect an appeal, the time allowed for appeal does not begin to run until the motion is disposed of.

Such motion, whether sound or defective, under such circumstances, is not a sham, and must await disposition by the district court before time for appeal begins to run. *Yanow v. Weyehouser Steamship Co.,* supra.

As stated in *Witt*, supra:

"It is elementary that where a motion for new trial is made in time and is entertained by the court, the time allowed for appeal does not begin to run until the motion is disposed of."

★ ★ ★

"The liberal rules of Civil Procedure must not be transformed by judicial interpretation into technical traps for the unwary. As we said in *Fishbaugh v. Armour & Co.,* 4 Cir. 185 F2d 541, 542, the rules should be liberally construed and review should not be denied on mere technicalities where this can be avoided."

Therefore, in reliance on *Thompson v. Immigration Service,* supra, and *Wolfsohn v. Hankin,* supra, it is respectfully suggested that petitioner's motion to dismiss was properly denied by the United States Court of

Appeals for the Fourth Circuit, and the petition for certiorari should be denied.

Respectfully submitted,

/S/Israel Steingold
Israel Steingold
Steingold, Steingold & Nachman
1116 United Virginia Bank Building
Norfolk, Virginia 23514

CERTIFICATE OF SERVICE

In accordance with the provisions of Rules 21 and 33, Revised Rules of the Supreme Court of the United States, I hereby certify that I have filed forty (40) copies of the foregoing Brief in Response to Petition for a Writ of Certiorari in the Clerk's Office, Supreme Court of the United States, and served three (3) copies upon Richard A. Repp, Esq., Hirschler, Fleischer, Weinberg, Cox & Allen, counsel of record for Fidelity Corporation, at 4 North Fourth Street, Richmond, Virginia 23219, his last known address, by depositing same in the United States mail, first class postage prepaid, this eighth day of July 1977.

/S/Israel Steingold
Israel Steingold

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
NOV 8 1974

REGAL WINE, INC. :
:
v. :
:
FIDELITY CORPORATION :
and :
AMERICAN FOREIGN, INC. :

CIVIL ACTION No.
NO. 73-460-R

ORDER

Deeming it proper so to do, it is ADJUDGED and ORDERED that the motion of the plaintiff for the Court to alter and amend its judgment, be, and the same is hereby, denied.

Let the Clerk send copies of this order to all counsel of record.

United States District Judge

Date: NOV 08 1974

EXHIBIT A

BEST COPY AVAILABLE

I can then recess for luncheon and decide the case this afternoon. I do need several hours for looking at the exhibits. But I am going to decide it, if I can, from the bench.

Justice delayed is justice denied. I will be in a better position to decide it today than I will be at any other time in my life, I suspect. There may be some further research that I will have to do. I will be glad to hear your arguments if that procedure is agreeable.

MR. STEINGOLD: If Your Honor please, I have here part of a summary search that I have made copies of, if the Court will permit me to leave it with the Court, and copies to opposing counsel.

THE COURT: Yes, I would like to have it.

MR. STEINGOLD: This is part of a summary that I prepared.

THE COURT: Let me ask you this Would you prefer to have a luncheon recess at this time and then make your arguments?

MR. ALLEN: Judge, I am willing to waive closing argument, unless the Court wants to hear it.

What is the Court's pleasure? I can make it detailed, factual, or whatever the Court wants to do.

THE COURT: Well, I don't want you to talk about the facts. Talk about the law a little bit, if you wish. I have to get my thoughts assimilated.

Mr. Steingold, do you wish to make argument?

MR. STEINGOLD: It really doesn't make any difference, if Your Honor please.

THE COURT: I have so much to do, don't burden me with something that doesn't make any difference.

MR. STEINGOLD: What I mean —

THE COURT: I know.

EXHIBIT B

MR. STEINGOLD: I don't know what the Court thought I meant; I said it didn't make any difference whether I ate first or ate lunch later. I can make whatever argument you wish.

THE COURT: Well, if there is no objection, I will excuse the court reporter so he can rest up for the findings of fact and conclusions of law that I will dictate to him.

MR. ALLEN: No objection, Judge. We will miss him, but I know he would like to leave.

THE COURT: Mr. Steingold, do you have any objection?

MR. STEINGOLD: No, sir.

(The reporter was excused at 12 o'clock.) (Findings of fact and conclusions of law previously transcribed.)

I certify that the forgoing is a true and correct transcript.

/S/Gilbert Frank Halasz
Gilbert Frank Halasz
Official Court Reporter

United States District Court

FOR THE

EASTERN DISTRICT OF VIRGINIA - RICHMOND DIVISION

CIVIL ACTION FILE NO 73-460-R

REGAL WARE, INC.

vs.

FIDELITY CORPORATION and AMERICAN FORESIGHT, INC.

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Robert R. Merhige, Jr., United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered.

It is Ordered and Adjudged that the plaintiff, REGAL WARE, INC., recover of the defendant, AMERICAN FORESIGHT, INC., the sum of TWO HUNDRED TEN THOUSAND, FIVE HUNDRED SEVENTY ONE AND 96/100 DOLLARS ($210,571.96) with legal interest thereon at the rate of Six Per Cent (6%) per annum from the 3rd day of July, 1973 until paid,

It Is Further Ordered and Adjudged that the defendant, FIDELITY CORPORATION, recover of the plaintiff, REGAL WARE, INC., its cost of action.

Dated at Richmond, Virginia, this 22nd day of August, 1974.

W. Parker Porter, Jr., Clerk

By: Deputy Clerk

EXHIBIT C

BEST COPY AVAILABLE

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REGAL WARE, INC.	:	
Appellant	:	
V.	:	CASE NO. 75-1219
FIDELITY CORPORATION	:	
APPELLEE	:	

AFFIDAVIT

STATE OF VIRGINIA)
CITY OF Norfolk) SS

Israel Steingold, being duly sworn, deposes and says:

1. He was attorney of record in the trial of action styled Regal Ware, Inc. v. American Foresight, Inc. and Fidelity Corporation, Civil Action No. 73-460-R, which was tried in the United States District Court at Richmond before the Honorable Robert R. Merhige, Jr., without a jury commencing on August 15, 1974 and terminating on August 19, 1974.

2. After the cause was argued on the morning of August 19th, the District Judge stated that he would prepare his Findings of Fact and Conclusions of Law and would dictate them to the official Court Reporter later that day, and that it would not be necessary for counsel to be present, that the Reporter would forward a copy to counsel.

3. Counsel for plaintiff thereupon returned to his office at Norfolk, expecting copy promptly.

4. On August 21, 1974, he received copy of the judgment entered by the Clerk the previous day, copy of which is attached hereto, but nothing from the Court

EXHIBIT D

Reporter.

5. A pre-trial hearing being set before Judge Merhige in another matter for August 22, 1974, his associate, Jeffrey M. Steingold, attended and attempted to obtain a copy of the Judge's Findings from the Court Reporter. The Reporter was not available

6. Affiant then tried to reach the Reporter by telephone and was informed by the Clerk that he was out of town, on vacation, as affiant recalls.

7. Accordingly, affiant telephoned Judge Merhige, explained the dilemma, that he wished to file a motion for a new trial feeling that a review would be helpful but could not state the grounds, not knowing the basis for the adverse decision in favor of Fidelity Corporation. Judge Merhige authorized affiant to file the motion, reserving the right to assign grounds when copy of the court's findings were received.

8. Pursuant thereto counsel for Plaintiff-Appellant promptly filed Motion for New Trial and to Alter and Amend Judgment on August 27, 1974, copy of which is attached hereto.

9. On September 3, 1974, affiant found that the Court Reporter was in Richmond, went to his office and requested a copy of the Findings of Fact and Conclusions of Law. He stated that he had prepared a rough draft for Judge Merhige and delivered it to him. Affiant requested that he be permitted to see a copy of the draft, it being important that he know the basis for the Judge's decision. The Court Reporter felt that he had no right to let counsel see it until approved by the Judge.

10. Counsel then went to the chambers of Judge Merhige. It developed that he was witting in Boston and

would be there for several weeks. His secretary stated that she was unable to find the copy referred to by the Court Reporter.

11. Counsel wrote Judge Merhige for assistance in obtaining the Findings on September 6, 1974, and again on September 20, 1974. He finally learned that the Findings had been filed on September 9, 1974 by virtue of a notation at the bottom of counsel's letter to the Judge dated September 20, 1974, copy of which is attached to Appellant's Answer this day filed, received on September 27, 1974.

12. The failure to specify grounds was due to a combination of counsel's reliance on the authority of the District Judge in permitting the motion to be filed as it was, and in the belief that filing under Rule 59(c) did not require specific grounds, as indicated by comment in Moore's Federal Practice and Procedure, referred to in the accompanying Memorandum of Law.

/S/Israel Steingold
Israel Steingold

Subscribed and sworn to before me in my City aforesaid, in the State of Virginia, this 10th day of July 1975. My commission expires: May 31, 1976.

/S/Charlotte Wright
Charlotte Wright
Notary Public

September 6, 1974

Honorable Robert R. Merhige, Jr.
U.S. District Judge
Tenth and Main Streets
Richmond, Virginia

Re: Regal Ware, Inc.
Vs. American Foresight and
Fidelity Corporation
Civil Action 73-460-R

Dear Judge Merhige:

It has now been more than 15 days since you entered judgment in the above matter. In order to comply with Federal Rules of Civil Procedure, I filed a motion for a new trial and to alter or amend judgment although I did not at that time have the benefit of knowing what your Findings of Fact were or what your Conclusions of Law were.

You may recall you suggested that I file the motion and submit the reasons for the motion after receipt of a copy of your Findings of Fact and Conclusions of Law.

Should my motion be faulty because of failure to assign reasons, my time for appeal would expire on September 19, 1974, which is slightly more than a week away.

I requested a copy of your Findings from the court reporter but he stated that he could not furnish me with such copy until you had edited it. I then asked your secretary if I could see the Findings in rough so that I might have some idea of the legal situation.

You may further remember that I had suggested to you that we might ask leave to amend the proceedings to meet the technical situation if the basis for your Findings is what I suspect.

EXHIBIT E

Would it be possible for me to get a copy of your Findings of Fact and Conclusions of Law at this time with the understanding that they may not be in final form and subject to further revision?

Respectfully,

Israel Steingold

IS/kmk
cc: Richard A. Repp, Esq.
Hirschler and Fleischer
4 North 4th Street
Richmond, Virginia 23219

LAW OFFICES
STEINGOLD, STEINGOLD & FRIEDMAN

September 20, 1974

Honorable Robert R. Merhige, Jr.
U. S. District Judge
Tenth and Main Streets
Richmond, Virginia

Re: Regal Ware, Inc.
Vs. American Foresight and
Fidelity Corporation
Civil Action 73-460-R

Dear Judge Merhige:

The above case was tried before you on August 15 and 16, 1974. That noon when the case terminated you stated that you would announce your Findings of Fact and Conclusions of Law at 3:00 o'clock that afternoon, as I recall. You further stated that it would not be necessary for me to be present. I, therefore, returned to Norfolk.

This matter is of considerable importance to my client. If we had the benefit of your Findings of Fact and Conclusions of Law, we would know the basis for your decision in denying liability against Fidelity Corporation.

As authorized by you, I filed a motion for a rehearing without stating the legal basis for the motion with the understanding that this information would be supplied upon my receiving your Findings of Fact and Conclusions of Law. As I previously explained, I have not been able to get that information from the court reporter or from your office. Is there not some misunderstanding here.

Respectfully yours,

Israel Steingold

Encl.

EXHIBIT F

BEST COPY AVAILABLE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1219

REGAL WARE, INC.,

Appellant,

v.

FIDELITY CORPORATION,

Appellee.

APPELLANT'S REPLY MEMORANDUM TO MOTION TO DISMISS

PRELIMINARY STATEMENT

Although it is usual for a moving party to support his motion by a memorandum, the movant here, Fidelity Corporation, failed to do so in support of the motion to dismiss.

Appellant, Regal Ware, Inc., proceeded to file its response as required by Rules 26(c) and 27(a), Rules of Appellate Procedure. The Motion to Dismiss was served by mail on July 1, 1975, and Appellant's Response was served on July 10, 1975, within the time permitted by Rule 26(c). Now, 23 days later, appellee belatedly files its initial memorandum. The basis of appellee's motion being a technical delay in filing notice of appeal, it seems to be a case of the pot and the kettle.

Furthermore, appellee has resorted to the highly unusual procedure of an *ex parte* conference with the

EXHIBIT G

District Judge whose findings of fact and law are sought to be reversed, to obtain his assistance in opposition to this appeal. It appears from the letter from the District Judge filed by appellee as an exhibit with his belated "Memorandum in Support of Motion to Dismiss", that counsel had submitted a "statement" for the signature of the District Judge without notice to counsel for appellant or an opportunity to be heard. It is counsel's understanding that it had always been the practice of Chief Judge Hoffman to have the official court reporter take minutes of all informal conferences such as this.

It appears from Judge Merhige's letter that counsel for appellee discussed with him the affidavit of counsel for appellant filed with appellant's response to the motion to dismiss. He does not "recall", but then, for the "benefit" of this Court he proceeds to *recall* matters on August 6, 1975, which took place on August 19, 1974. Appellant objects to the inclusion of such irregular matter in the record of this appeal.

Appellant vigorously objects to this highly irregular procedure in not having been given the same opportunity to refresh the Judge's recollection as was apparently given to counsel for appellee.

The Court Reporter's official transcript does not contain the excerpt dated August 20, 1974. See page 511 of the transcript. The information contained in the excerpt filed by appellee is absolutely new to counsel as of receipt of copy on August 7, 1975, as an exhibit with appellee's "Memorandum". The District Judge had stated at the termination of the evidence, which was before the luncheon recess, that we could argue the matter then or come back later. (Transcript P. 511). It was decided to argue the case before the luncheon recess. Upon conclusion of argument, Judge Merhige stated he would

consider the matter and dictate his conclusions that afternoon at 3:00, that it would not be necessary for the parties or counsel to be present. This is indicated by the Court's remark that the court reporter would be excused during argument "so he can rest up for the findings of fact and conclusions of law that I will dictate to him." Now we find from the exhibit for the first time that the Court dictated its findings the following morning. Judge Merhige had stated that it would not be necessary for anyone to be present when he dictated his findings, that counsel could get a copy from the Court Reporter.

This is where the trouble began, as related in the affidavit of counsel for appellant. The findings were not forthcoming.

The Court Reporter could not be reached. He had left for vacation or was away. This necessitated the call to the District Judge, who suggested the filing of the motion with reservation of specific grounds until after his findings became available. The District Judge then left on an assignment to Boston. Upon the Reporter's return to Richmond he stated that he was not at liberty to show the rough draft of the Court's findings to counsel until they had been approved. The Judge's secretary could not permit counsel to see the Judge's copy, stating that she could not find it.

FACTS

FACT ON

The letter of counsel for appellant to Judge Merhige dated September 20, 1974, attached to Appellant's Response to Motion to Dismiss, recited the facts then fresh in mind, and they bear out the foregoing. Judge Merhige did not dispute or contradict them, so it is respectfully suggested that this Court may consider the

facts there stated as established.

FACT TWO

The flat contradictory statement contained in Paragraph 4, page 3, of appellee's memorandum that *"counsel for Regal Ware, Inc. could not have received a copy of the judgment order on August 21, 1974, as set forth in his affidavit inasmuch as that order was not entered until August 28, 1974,"* is a charge that counsel made a false statement under oath. This is a serious charge. As the Chinese proverb goes, one picture is worth a thousand words. See copy of judgment order attached hereto dated August 20, 1974, under the seal of the Court, attested by the Clerk. The date of "August 21, 1974" appearing at the bottom right-hand corner indicates the date received in counsel's office at Norfolk.

What brought on the *nunc pro tunc* order of August 28, 1974, was the request of counsel for appellant that the Clerk enter separate judgments as required by Rule 58, Federal Rules of Civil Procedure.

FACT THREE

Counsel for appellee follows the foregoing charge of bad faith with another, in the form of a question:

> "Why did counsel for Regal Ware, Inc. deem it necessary to file a motion to amend, the date of the certification on which is August 27, 197(5)4, when ostensibly he was not even aware on that date of the decision?"

As shown in the comments under foregoing FACT TWO, counsel *had* received the *joint* judgment order on August 21, 1974. Obviously the Motion to Alter and Amend was filed before receipt of the *nunc pro tunc*

order. Do the Clerk's records not show that it was received in that office on August 28th or 29th? Counsel does not say, he merely seeks to discredit his opponent by innuendo.

In the letter solicited by counsel for appellee, dated August 6, 1975, Judge Merhige states that he "would be inclined to believe 'I' made no stronger statement to Mr. Steingold telephonically than is contained in my letter of December 26th . . ." This is not a contradiction of counsel's statement under oath that Judge Merhige "authorized affiant to file the motion, reserving the right to assign grounds when copy of the court's findings were received". (Paragraph 7 of counsel's affidavit). This was almost identically the situation in *Witt v. Merrill*, cited in appellant's original memorandum. See discussion in appellant's memorandum in support of its answer to Motion to Dismiss, at pages 2 and 3. Almost the only differences are (1), the parties and (2), the Witt motion was oral and without grounds, and here the motion was written and duly filed, pursuant to the authorization of the District Judge. Otherwise the alternative would have been to file Notice of Appeal, a very simple procedure.

FACT FOUR

After receiving a copy of the court's findings, counsel filed documented and detailed requests to alter and amend on October 10, 1974. He requested oral hearing on the motion. See copy of letter to Judge Merhige dated November 22, 1974, attached hereto. No reply memorandum was filed by appellee and no date for argument was set.

Then counsel for appellant Regal Ware learned, through a pleading filed by counsel for appellee in a companion case in the Circuit Court of the City of Richmond, Division II, that Judge Merhige had entered

an order on November 8, 1974, denying the Regal Ware motion. To this day counsel for Regal Ware has not received a copy of that order from the Clerk of the District Court. He obtained a copy from the record after it was lodged in this court in order to include it in his appendix. The fact that the notice of appeal was timely filed was therefore purely by chance. (See copy of letter to Judge Merhige dated December 3, 1974, hereto attached).

This situation was apparently what brought on Judge Merhige's critical letter of December 26, 1974, in which he said:

> "Your letter of November 25th was deliberately not replied to."

What probably happened was that the Clerk, by inadvertence, sent three copies of the order of November 8th to counsel for Fidelity. What prompts this thought is that in the course of oral argument in the Richmond Circuit Court in the companion case, appellee's attorney, Mr. Repp, tendered for the record there *three* copies of that order under the seal of the District Court. The court reporter's notes of the hearing on April 18, 1975, in that case, may show comments of counsel for Regal Ware in that connection, to the effect that "this probably explains why counsel for Regal Ware did not get a copy of that order."

This unusual situation, for which counsel for Regal Ware could not remotely be blamed, apparently upset Judge Merhige, as indicated by the strong language used.

Counsel for Regal Ware obtained the wording of the order of November 8, 1974 by a long distance telephone call to the District Court Clerk at Richmond on December 4, 1974, according to notation in counsel's file. (See copy attached hereto). On the same day Notice of Appeal

was filed.

CONCLUSION

This has truly been an unusual situation. Counsel for Regal Ware did what appeared to be proper. Whatever caused delay or failure to supply copies of orders or copy of findings cannot be traced to counsel for appellant. The only criticism might be that he did not have to take the risk embodied in following the suggestion of the District Judge in filing his motion under Rule 59 FRCP, reserving statement of grounds. He did so rather than abruptly filing notice of appeal without giving the District Judge the opportunity to alter and amend his findings. It was sincerely felt that when the record and the law were presented to the District Judge he would alter or amend his findings to conform to the evidence as counsel saw it, or permit the amendment of the action to a general creditors' suit to meet the Judge's objections to the form of action stated in the record. This is covered in Appellant's Brief, pages 48-50.

This matter is of entirely too great importance to cut off Regal Ware's rights by summary dismissal of its appeal on a technical error of this type under existing circumstances. The Supreme Court and this Court have held that the grounds for dismissal here urged should be overruled.

It is respectfully submitted that Regal Ware should be given its day in court, that the motion to dismiss should be overruled.

Israel Steingold
Counsel for Regal Ware, Inc.
Appellant

I hereby certify I served a copy of the foregoing Reply Memorandum on counsel for defendant-appellee by mailing a copy to the offices of Richard A. Repp, Esq., Hirschler & Fleischer, 4th and Main Streets, Richmond, Virginia 23219, on this 13th day of August 1975.

Israel Steingold

November 22, 1974

Honorable Robert E. Merhige, Jr.
United States District Judge
10th and Main Street
Richmond, Virginia

Re: Regal Ware, Inc.
Vs. American Foresight, Inc.
CA # 73-460-R

Dear Judge Merhige:

I filed Motion for a New Trial and to Alter or Amend Judgment on August 27, 1974. At that time your court reporter was out of town and I could not get a copy of your Findings of Fact and Conclusions of Law. You told me to go ahead and file the motion and then file the grounds after obtaining the transcript of the Findings.

The following week I was in Richmond and went by the court reporter's office. He stated he had transmitted the Findings of Fact and Conclusions of Law to you in rough form for proofreading and could not let me see a copy of that draft. I went to your office. Your secretary stated that you were out of town and that she did not know where the copy of the rought draft could be found. I assume she felt it unwise to let me see it without specific authority from you.

I then wrote you on September 6, 1974 asking whether it would be possible for me to get a copy at that time with the understanding that it might not be in final form and subject to further revision. I received no reply.

I wrote you again on September 20, 1974 calling this to your attention. My letter was returned with a notation that your Findings of Fact had been lodged in the Clerk's

office on September 9, 1974.

I then promptly prepared a memorandum in support of my motion and have been awaiting notice for you of a hearing date. No reply memorandum has ever been

received from opposing counsel. In order to avoid complications relating to the time element, I would appreciate a date for hearing my motion.

Respectfully yours,

Israel Steingold

IS/kmk
cc: Richard A. Repp, Esq.

December 3, 1974

Honorable Robert E. Merhige, Jr.
United States District Judge
Tenth and Main Streets
Richmond, Virginia

Re: Regal Ware, Inc.
Vs. American Foresight, Inc.
CA # 73-460-R

Dear Judge Merhige:

On November 22 I wrote you with reference to my pending Motion for a New Trial and to alter or Amend Findings. My request was that we have a date for hearing my motion, no reply memorandum having been filed.

Much to my surprise I find from a pleading filed by Hirschler and Fleischer in the Circuit Court of the City of Richmond that my motion was denied by order dated November 8, 1974.

The clerk did not furnish me with a copy of that order. My time for appeal expires at the end of this week.

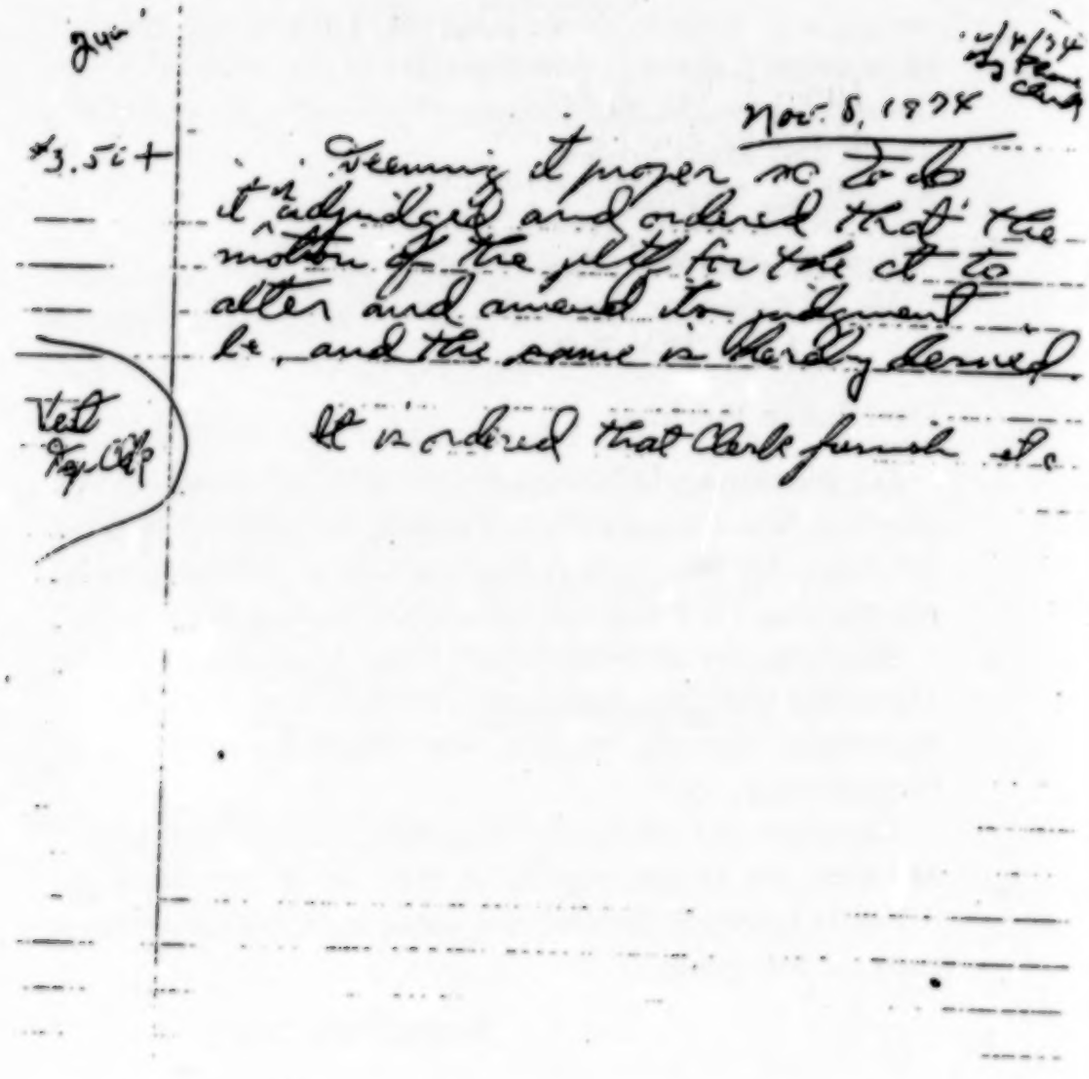
Could I get you to have the clerk to furnish me with a copy of this order.

Respectfully yours.

Israel Steingold

IS/kmk

PART OF EXHIBIT G


Nov. 8, 1974

Deeming it proper so to do
it is adjudged and ordered that the
motion of the plff for the ct to
alter and amend its judgment
be, and the same is hereby denied.

It is ordered that Clerk furnish cc

PART OF EXHIBIT G

BEST COPY AVAILABLE

October 23, 1974

James F. Pascal, Esq.
Hirschler and Fleischer
2nd Floor Massey Building
4th and Main Streets
Richmond, Virginia 23219

Re: Regal Ware, Inc.
Vs. American Foresight, et al
Civil Action #73-460-R

Dear Mr. Pascal:

Upon my return to Norfolk I found your letter of October 14, 1974 enclosing Judge Merhige's Findings of Fact and Conclusions of Law. I have finally obtained a copy from the clerk's office after several attempts to see a rough draft within ten days of the trial and several weeks later again. When I was in Richmond I tried to contact the court reporter but he was away and Judge Merhige's secretary was away also. The lady who took her place could give me no help.

I finally located Judge Merhige in Boston and he informed me that he had filed the Findings on September 9, 1974. Why I could not get a copy until this late date I do not understand. It is a most unusual situation.

I assume also that you have received copy of my memorandum in support of the motion filed in August pursuant to Rule 59(a)(e).

Yours very truly,

Israel Steingold

EXHIBIT H

IS:lad

cc: W. Fraley Powers, Jr., Clerk
United States District Court
Richmond, Virginia

October 14, 1974

Israel Steingold, Esquire
Steingold, Steingold & Friedman
1116 United Virginia Bank Building
Norfolk, Virginia 23514

Re: Regal Ware, Inc. v. American Foresight, et al
Civil No. 73-460-R

Dear Mr. Steingold:

On or about August 27, 974, this office received, by mail, a motion filed by you on behalf of the plaintiff in the above matter. This motion was filed pursuant to Rule 59 (a) and (e) of the Federal Rules and provided that the reasons for filing same would be assigned upon receipt of the transcript of the Findings of Fact and Conclusions of Law. These were filed on September 9, 1974, and in the event that you have not received a copy, I am enclosing one for your reference.

Since it has been in excess of one month since the date upon which the Court's Findings and Conclusions were filed, it occurs to me that it is now incumbent upon you to bring your motion forward for further disposition. I believe that it is Judge Mehrige's normal practice to have these matters fully briefed and submitted to the Court in writing prior to hearing oral argument, if oral argument is desired. you may, however, wish to confirm this for yourself.

In view of the fact that the Court's Findings and Conclusions were filed on September 9, 1974, and therefore have been available to you since that time, I feel that it would be proper for you to pursue your motion within the next two weeks and to take such further action as you deem necessary in

EXHIBIT I

order to have the motion ultimately resolved one way or the other. In the event that you fail to take the appropriate action within two weeks, you should be advised that I intend to move the Court to dismiss the motion.

I trust that you will keep me informed of any further developments pertaining to the disposition of your motion and I assure you that I will make every effort to accommodate your schedule. If you have any questions, please do not hesitate to contact me.

Very truly yours,

James F. Pascal

JFP/llh
Enclosure

cc: W. Farley Powers, Jr., Clerk